Cases are unintentionally unfair to the local authority; another that *Gelpcke* v. *Dubuque* was not denied nor affected by *New Orleans &c.*, v. *Louisiana &c.*, 125 U. S. 18, nor even treated to that silent suppression not unknown in that Court; — and there are other legal statements, certainly debatable, but stated with certainty. These are not errors; merely illustrations of the difficulty of pleasing lawyers generally by popular statements of technical matters.

All treatment of what the "business" bar calls the Federal specialties (as though they were a "line of goods"), — i.e. admiralty, patents, trademarks, copyright and bankruptcy, is disclaimed; but mention if not comment is not avoided.

The admiralty has, to be sure, suggested political questions which never arrived; but to comment on prize without recognizing the dominance of Stowell, or on the instance side without considering the influence on Story, and through Story on the country of the Provincial Vice-Admiralty tradition; — is to leave Hamlet out of the play. The sole reference to patents is mention of *O'Reilly* v. *Morse* as "upholding" the basic telegraph patent, a curious citation without any reference to the annulment of Morse's famous eighth claim, the vital point which has ever since affected this doctrine of patentable invention, and which embittered the patentee for life.

Then too it is surely the zest of the chase which finds in *Jenners* v. *Peck*, 7 How. 612, a concession to states-rights. The case merely construed the Bankruptcy Act of 1841, assuming a power in Congress to annul liens by mesne process: something it has done in subsequent acts without objection.

It would have been better to keep away from these nonpolitical questions; they would not have been missed in a book so pleasantly unlike a law-book; which is usually repellant because (as has been said) it seems always to be made by and for middle class people of middle age. This book shows what people of every sort and age said about their own constitutional law, while it was in the making.

CHARLES M. HOUGH

A TEXT BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN. By W. W. Buckland, M. A., F. B. A., of the Inner Temple, Barrister at Law, Regius Professor of Civil Law in the University of Cambridge, Fellow of Gonville and Caius College. Cambridge: The University Press. 1921. pp. xiv, 756.

Almost a century elapsed before the text of Gaius thoroughly affected ideas formed on the basis of the Institutes and the Digest before the discovery of the earlier institutional book. For a long time there was a tendency to seek to fit the statements of Gaius into or to adjust them to preconceived notions and to antedate systematic ideas of the maturity of law and Byzantine academic systematizings and organizings of rules and prunings away of archaisms. More recently the rise of a new and more truly historical method, the development of better methods of criticism and study of interpolations and the bringing to bear of new materials outside of the *Corpus Iuris* have required further modification of received views. For many years Girard's Manuel has been the teacher's main reliance for this purpose. Professor Buckland has now given us a book no less indispensable to the teacher — a book that ought to supersede everything in English and

that will stand with the most thorough studies and best expositions of the sources in any language.

Nineteenth-century Romanists studied Roman law chiefly for the purpose of a historico-analytical critique of the law of their time, and their ideas of the classical law and of the law of Justinian were in part colored by the exigencies of this mode of study. They tended to see in the third-century law an analytical system and a consistent unfolding of legal doctrine such as they desired for nineteenth-century law. Also instead of considering just what the Roman problems were and exactly how the Romans met them they tended to see in the Roman texts answers to modern theoretical problems. Partly this attitude was an inheritance from the seventeenth-century idea of Roman law as embodied reason. Partly it was due to Roman law having become more and more an exclusively academic subject. But chiefly it was due to the use of the institutes of Roman law as a means of teaching the science of law and the consequence of looking at Roman law through the medium of the legal controversies and juristic problems of today. Reaction from these characteristics of the Romanist literature of the nineteenth century has led to an endeavor to reconstruct and state the law from Augustus to Justinian as a Roman might have stated it; using only the Roman texts or at least only contemporary materials, using only Roman classifications and theories and analyses, and applying the materials only to Roman problems. The present book is one of the very best of this recent type.

It is severely of this type, subordinating history, doctrinal analysis and comparative law to an exposition of the texts purely as Roman materials. Because of this and of the compressed style, required to pack so minute a survey of a large field into one volume, it is by no means a book that one may read rapidly. Yet the exposition is exceptionally clear and the point is put in an apt and striking way in the fewest possible words. Sometimes the exposition is epigrammatic and in such cases — something rarely true of epigrammatic utterance — it is marked at the same time by the good sense and the instinct for realities of the common law lawyer.

Exact ascertainment of the rules of law as they were, so far as they may be ascertained, unembarrassed by collateral considerations, is a necessary forerunner of the real understanding of Justinian's law, that is needed as a basis of comparative law now that Justinian's books have ceased to be forms of law anywhere and in consequence may be approached independent of the "interpretations" of them and developings of their texts which grew up from the twelfth to the nineteenth century. How strictly the design of such an exact ascertainment is adhered to is illustrated in the admirable exposition of *culpa* (pp. 552–555). We cannot understand *culpa* in the *Corpus Iuris*, looked on as a system thereby established, without exactly this sort of statement — a model of concise but complete exposition of a difficult and involved subject, not as theoretically it ought to have been, or doctrinally it might have been, but as it was, so far as we have the means of ascertaining. Such things justify the method of the book. And yet since the modern law of half of the world and some of the law of the other half presupposes the law of the *Corpus Iuris* and thus the latter must be the starting point of comparative law, the ultimate rôle of this method may be only to lead up to a better systematic, historico-analytical exposition of the law of Justinan as such. For just as we sometimes must remind the historian that it was seventeenth-century English law and hence the medieval English law as expounded by Coke, not the law of the Year Books as it actually was in its time and place, that became the common law of the English-speaking new world, so we may have to remind the historical and philological Romanist that it was Roman law as codified by Justinian, not

the actual law of the Antonines — much less that of Augustus — that became the common law of western Europe.

Moreover the method of using only analyses to be found in the Roman books and of using only Roman systematic ideas may be carried so far that the end of obtaining an exact picture of Roman law is to some extent defeated. The strict law is a system of remedies, a system of actions, not a system of rights and duties as such. Roman law began to generalize at the end of the Republic and generalized much and to good effect in its classical period. But it was a generalization in order to answer concrete questions and to allow or devise concrete remedies, not, for the most part, a systematizing generalization. Thus the law acquired principles without ceasing to be a system of remedies. We may well compare what took place in our own law. It was a system of remedies in Coke's day and, although a radical change took place in the seventeenth and eighteenth centuries, appeared to be one at the opening of the nineteenth century, and in the law of torts until the last quarter of that century. In the nineteenth century it was restated in terms of a system of rights and duties. A like systematizing movement went on in Roman law from the fourth to the sixth century. A tendency developed to put the law substantively in terms of duties and rights, not adjectively in terms of remedies, and to classify duties and rights rather than actions — the same tendency which is so noticeable in nineteenth-century law. But this movement did not go far. The Byzantine lawyers lacked ability to carry it out. The law of the Digest is still chiefly in terms of remedies with no thoroughgoing analysis either of the whole or of the several branches — or even, as a rule, of the smaller subdivisions — in terms of duties and rights. Professor Buckland gives a clear and faithful picture of the Roman law books in this respect. One is not so sure that it is so faithful a picture of Roman law.

Comparison with a like phenomenon in our own law may be helpful. Except in the law of estates in land, with respect to which the old procedure was obsolete, Blackstone states the common law largely — one might say chiefly — in terms of procedure. Such books of the time as Comyn's Digest or Bacon's Abridgment are primarily in terms of procedure. In this respect they derive from Coke, who stated English law authoritatively, as the next two centuries chose to think, in terms of our strict law and so procedurally. In method the eighteenth-century expositions speak from the strict law which culminated in the classical writings of Coke. But do we not actually state eighteenth-century English law better — both more usefully for our purposes and more truly for understanding just what it was — when we analyze and systematize the substance behind the remedies than when we state it as Blackstone's contemporaries did in what was already in their time an archaic dress? For in truth their law was much more advanced than their method of expounding it. Does Blackstone really give us an accurate picture of the law of Lord Mansfield's time? That he does not has often been remarked of his exposition of equity which he states procedurally rather than doctrinally and hence more as it was at the end of the sixteenth century than as it was under and after Lord Hardwicke. This is no less true of other parts of his exposition, as one may see, for example, by comparing his statement of the law of contracts with the law reports of the time. One may ask, then, whether Roman systematic exposition gives us a wholly accurate picture of what Roman law really was. Do our practitioner's books today give a reliable picture of our law as it really is? Is it not much more scientific, has it not a much better logical and doctrinal apparatus than these books, as a rule, make apparent?

Much depends upon the purpose for which Roman law is studied. We cannot well say that it is studied for its own sake. No one can study it

today for the purposes for which it was studied by third-century Romans or sixth-century Greeks. Nowhere in the world is it a system of law in the sense in which it was one then. Nor are the circumstances of its application so completely known to us that we can exactly reproduce it in action and know it as a living system as could those who studied it that they might practise it, administer it in tribunals and teach it to those who lived under it. Our purpose must be one or more of four. We may study it for an introduction to or as the basis of comparative law. Or we may study it for an introduction to analytical jurisprudence or as a concrete study in that branch of the science of law. Or we may study it for an introduction to the actual law of the land, as they do in Continental Europe. But in countries governed by English law it is not required for this purpose by its place in their legal history. Also it may be studied for historical purposes; as part of the history of civilization and of one of the chiefest of the phenomena of civilization, the ordering of human relations and administration of justice according to law. Probably the first and fourth of these are the chief purposes for which it is studied today in English-speaking countries. Such a picture as Professor Buckland gives us is a needed preliminary to the use of Roman law for comparative law and comparative legal history and is of peculiar value to the study of Roman law as part of the history of civilization.

As has been indicated already the method and aim of the treatise are to state the problems, the doctrines and the systematic ideas and classifications of the Roman lawyers from Augustus to Justinian and to set forth the rules of Roman law during that period from that standpoint; to consider Roman problems and to explain in Roman legal terms only and with Roman legal ideas and the Roman analytical and systematic apparatus how the Romans dealt with them. One need not say that such an ideal cannot be achieved entirely. Often the evidence is too meager or the texts as we have them are too corrupt or we lack the whole background which is so decisive of the course of law in action. Professor Buckland is scrupulous to make this clear in every connection. Where the data are insufficient he puts the evidence and says that there is an unsolved problem. He does not seek to settle by modern juristic reasoning what the Romans never settled or were unable to settle. There is no attempt to spin fine theories and no adoption of fine-spun theories to explain unexplainable contradictions or uncertainties in the *Corpus Iuris*. In the absence of texts he abstains from answering questions on the basis of principles deducible from the texts which there is no evidence that the Romans did deduce therefrom. He seldom indulges in speculation. When he does so it is with the utmost caution and restraint. Sometimes, indeed, he carries his refusal to speculate to the extreme, as in not considering the basis of *periculum rei* in sale, a matter of much importance for comparative law (p. 484). When he does suggest a doctrinal theory or an explanation or an analytical systematic principle not in the texts, he states the difficulties frankly. He is scrupulously careful when any term is used which is commonly employed in modern Romanist literature but not in the Roman texts to point out that fact. When a proposition is stated on the basis of even the clearest analogical reasoning, he is scrupulously careful to say that there are no texts for it. As a rule he keeps away from doctrinal or institutional history except as involved in stating what the texts and sources show to have been the law at different times successively. But when the data afford an assured basis for telling a bit of legal history germane to the exposition, it is told admirably, as in the case of the origin and growth of imperial legislative power and the after-the-event dogmatic explanation thereof as resting on the *lex regia* (pp. 16–17).

All these things are in praiseworthy contrast to the general current of writing about Roman law in the nineteenth-century, which was still too much under the influence of the seventeenth- and eighteenth-century assumption that Roman law was declaratory of natural law and hence that if a proposition appealed to the time and place as being just, in the absence of Roman texts to the contrary, jurists were justified in pronouncing it a proposition of Roman law.

But at times one feels that Professor Buckland carries his caution and restraint too far. Roman law was not the perfect system of absolute abstract justice or absolute systematic arrangement or absolute logically interdependent principles that it was once fashionable to pronounce it. Yet it was at least no more arbitrary than our law today and there is danger that over-insistence upon particular doctrinal anomalies as such and skeptical minimizing of system and analytical theory will give a wrong impression at the other extreme.

Professor Buckland seeks always to give us the Roman analysis, the Roman classification and the Roman doctrinal reasoning. He even follows the order of the Roman texts, thus giving us Roman materials presented in the Roman way. This involves frank presentation of the analytical confusions and doctrinal incongruities that are always to be found in a system of law when looked at with respect to any given moment. Even if analysis has been carried out thoroughly, which is seldom true, law is continually growing and will constantly develop new precepts and new institutions, chiefly by a process of trial and error. Analyses made without reference to these new precepts and new institutions or without reference to new applications of old ones, are always subject to exceptions and leave anomalies unaccounted for. There are always rules which defy the analyses and classifications that come after and seek to order and systematize and reconcile. It is good that these be shown in all their nakedness. There has been too much suppressing or glossing over of them in order to make out a perfect analytical system. A truthful picture of the actual Roman law involves abandonment of the attempt to fit every rule in the Digest into an absolute system.

In the same spirit in cases where there are principles which the Romans recognized, anomalies are not concealed by specious juristic reasoning but are pointed out openly. Thus, he says that simple solidarity is "an illogical relaxation" of correality, "a gradual historical development expressing the idea that those who do wrong ought not to be released from their obligation to compensate except by satisfaction" (p. 454). As we should say today it was a looking at substance rather than form and the analytical explanation is a systematic afterthought. Also he recognizes that many legal precepts depend simply on convenience and are not susceptible of analytical explanation. For example, in *hereditas iacens* there was no strict adherence to a theory. "The rules were based on considerations of convenience; logical justification is, at least for later law, little more than excuse" (p. 306). Likewise the different holdings as to whether the effect of satisfying a condition was retrospective "do not express any strict principle; they were a compromise — the needs of life were more important than theory" (p. 421).

This recognition that the legal order is a system of compromises and of the subordinate rôle of analytical theory is in accord with the trend of recent juristic thinking everywhere and makes the book valuable outside of its immediate sphere as a contribution to the science of law at large. For it is of much moment to analytical jurisprudence itself to recognize that the juristic doctrine of third-century Rome was not perfect even potentially, as it is of moment for the general science of law to dissipate the notion that it was perfect as a system of abstract justice or in its adaptation to

the ends of law. To see the classical Roman lawyers making practical compromises while reaching out for doctrines not yet grasped, and to compare this with Lord Coke's proposition that many things have been introduced into the common law contrary to legal reasoning on the ground of utility, is a useful exercise for the analytical jurist.

Such things contrast significantly with the general run of text books of Roman law, and one hesitates to express a doubt about so commendable a design so well executed. Yet I cannot but feel uneasy lest the subordination of analysis and rejection of modern systematic ideas may have gone too far. For the plan so scrupulously adhered to involves serious sacrifice. The author states without comment the proposition in the Digest that the contradictions it contains are only apparent, if the text is looked at properly (p. 34). Surely a caution to the unwary student would not be amiss here. This is a characteristic proposition of the maturity of law when all legal precepts are thought of as put in force at one stroke and juristic activity is thought of as a reconciling, ordering, systematizing activity whereby these precepts are to be made consistent and logically interdependent and are to be so classified as to be readily grasped and assuredly applied. Here and elsewhere one must feel that the design of excluding everything but the actual Roman law, as the Romans applied it to Roman problems, put in terms of Roman doctrinal reasoning and told in Roman classification and in the Roman order, has resulted in excluding too much. For example, in connection with interpretation by the *pontifices* he notes that there is not much to be said for the logic of their interpretations; they were useful means of altering the law to meet the needs of advancing civilization (p.2). In such a connection comparative legal history might be used with effect and without recourse thereto the matter may hardly be put in its real aspect. So in connection with the declaratory beginning of imperial legislation by rescript (p. 20). Or the remark that "the Roman habit" did not permit fusion of two issues, *e.g.*, claim and set off (p. 696). Is this merely a "Roman habit"? Is it not a general phenomenon of the beginnings of law and should it not be put as such? Or, again, in connection with the power of the Senate to direct a magistrate not to apply a given law in a given case or for a given time (p. 13). Here comparative law may be made to suggest matters of the highest value for the science of law. If Roman law is studied for its possibilities of enabling us to understand and to treat intelligently the law of today, such things must be looked into and must be emphasized. Yet so much has been written about Roman law from a juristic and comparative law standpoint without a solid basis in ascertainment of what the Roman law actually was that rigid adherence to a purely descriptive method is intelligible as a reaction.

It should be said, however, that parallels are sometimes suggested, *e.g.*, in connection with appeals by *rescriptum* (p. 19), and that sometimes, without going into comparative law, illuminating suggestions are thrown out as to where to look (p. 395). Moreover wide learning and a sense of the bearing of comparative legal history are shown by stray observations everywhere (see, *e.g.*, p. 7, note 2). But the strict exclusion of all matters that require comparative law or comparative legal history for a full answer is likely to prevent any but teachers of the highest ability and widest preparation using the book for anywhere near its full worth.

ROSCOE POUND.

CASES ON CONVEYANCING. By Joseph Warren. Cambridge: Published by the Editor. 1922. pp. xi, 807.

This work is, as Mr. Warren says in his preface, largely based upon Professor Gray's collection of cases on real property. The subject matter